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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FAUSTINO NUNEZ TORRES,

Defendant and Appellant.

A134569

(Solano County  
Super. Ct. No. FCR286839)

Faustino Nunez Torres appeals from a judgment upon a jury verdict finding him guilty of possession of a firearm by a felon (former Pen. Code,<sup>1</sup> § 12021, subd. (a)(1), repealed by Stats.2010, ch.711, § 4, now § 29800, operative Jan. 1, 2012) and possession of ammunition (former Pen. Code, § 12316, subd. (b)(1), repealed by Stats.2010, ch. 711, § 4, now § 30305, subd. (a)(1), operative Jan. 1, 2012). He contends that the trial court erroneously gave the jury a flight instruction and that section 654 bars imposition of a consecutive sentence for possessing ammunition. We agree with defendant's sentencing claim, but otherwise affirm.

**FACTS**

Defendant and Guadalupe Contreras lived together as a couple in Suisun. On June 13, 2011, defendant spent the night at his mother's home on Bella Vista in Suisun. Defendant was very depressed. He called Contreras on the morning of June 14, 2011, telling her that he did not want to live anymore.

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<sup>1</sup> All further statutory references are to the Penal Code.

Contreras went to defendant's mother's house at about 9 a.m. and talked with defendant. They spoke for about fifteen minutes; defendant was feeling poorly and cried. He asked Contreras to go out to the backyard with him. There, she saw that defendant had a small gun and he held it to his temple. Defendant was wearing a baseball cap. Contreras yelled at defendant and grabbed his hand. When defendant resisted, she let go and ran back inside the house. Seconds later, she heard shots fired. Contreras and defendant's mother screamed and ran outside.

Defendant was on the ground. He said his ear hurt. Contreras and defendant's mother saw the pistol on the ground next to defendant. Defendant's mother told Contreras to take the gun and run. Contreras did so and ran to the street about 100 meters away and hid between two cars. She thought defendant would try to follow her to take the gun away.

Within minutes, the police arrived. Officer Walker responded to the scene at approximately 10 a.m. He found Contreras in between two parked vehicles on a street adjacent to Bella Vista. He detained her for officer safety and found a gun on her person. The gun was loaded and had six rounds in it. One of the rounds had been expended.

Officer Arroyo arrived on the scene in response to a 911 call of "shots fired" and was able to communicate with Contreras, who spoke Spanish. Contreras told him that defendant wanted to hurt himself. Based on this information and the 911 call<sup>2</sup>, Walker put out a "be on the lookout" for defendant and a vehicle that had been seen fleeing the area immediately after the shots were fired.

Walker then went to the Bella Vista residence to investigate. He found a black baseball cap, several rounds of ammunition, and some loose change on the lawn in the backyard. There was a hole in the cap that appeared to have been caused by a firearm. Contreras, who returned to the house with Walker, told him that the ammunition was on the lawn in the immediate area of where defendant's head had been when he was laying there.

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<sup>2</sup> A neighbor made the 911 call.

At about 10:15 a.m. that same day, Officer Compton arrived on the scene of an accident on Route 12. Compton found that defendant's truck had collided with the center divider of Route 12. Defendant was still seated in the driver's seat when Compton approached the truck. Medical and emergency personnel were attending to him.

Torres was taken to the North Bay Medical Center. Walker went to the hospital to interview him. His purpose in interviewing defendant was to evaluate whether he was a danger to himself. He did not know at the time that defendant was a felon. Defendant was groggy, but he admitted that he wanted to kill himself with a gun, but " 'messed up or missed.' " Eight days later, Walker learned that defendant had a criminal record.

The parties stipulated that defendant had been convicted of a felony.

### **DISCUSSION**

Defendant contends that the trial court erroneously gave a flight instruction because there was no evidence that he left the scene to avoid detection or arrest and hence no justification to infer a consciousness of guilt.

The jury was instructed in the language of CALCRIM No. 372 that "[i]f the defendant fled immediately after the crime was committed or after he was accused of committing a crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

"[A] flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) To justify a flight instruction, the evidence must show that the defendant sought to avoid being observed or arrested. (*Ibid.*)

Here, the evidence suggested that defendant fled the scene after the shooting. Indeed, his flight was such that he was involved in an accident, colliding with the center divider of Route 12 within minutes of the shooting. The jury could have inferred from this evidence that defendant, in attempting to evade detection, drove recklessly resulting in the crash. The 911 caller also told the police that he saw a truck leave the scene

immediately after the shots were fired. Officer Walker further testified that he put out a “be on the lookout” for defendant and the truck. Given this evidence, the court was justified in giving the flight instruction.

Defendant argues that there is no evidence to support an inference that he left the backyard in order to avoid observation or arrest. He suggests that the 911 caller alerted the police because he heard the shots and saw Contreras running down the street. Officer Walker, however, testified that he placed an alert out for a white pickup truck<sup>3</sup> in response to the 911 caller’s observation that the truck fled from the scene after the shots were fired. While defendant could not have known that a call was made, he was a felon, and presumably was aware that he was prohibited from possessing a firearm and ammunition. The jury could therefore have inferred that he was motivated to avoid arrest.

Moreover, even if the evidence was insufficient to support a flight instruction, defendant was not prejudiced. First, the evidence was overwhelming that he fired the gun. Not only did Contreras’s testimony establish the facts of the shooting, defendant admitted to Officer Walker that he wanted to kill himself with the gun but messed up or missed.

Second, defendant relied on the instruction in his defense. Defendant argued that it was Contreras who possessed and fired the weapon: “One of the things that the People are going to rely on is this flight instruction. Flight means consciousness of guilt. I agree, flight means consciousness of guilt. Ms. Contreras fled from the scene of the crime holding a loaded firearm that had just been fired. Consciousness of guilt. [¶] The instruction specifically says that if you believe that someone fled from the scene of a crime, you can use that as consciousness of guilt. Consciousness that Ms. Contreras did something wrong and Ms. Contreras maybe shot at Mr. Torres. That Ms. Contreras was in possession of this loaded firearm . . . .” Given defendant’s theory of the case, we cannot conclude that defendant was prejudiced by the flight instruction.

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<sup>3</sup> The description of the truck included that it had a work name on the side of the vehicle.

Defendant also argues that the flight instruction was “impermissibly argumentative.” An argumentative instruction is one which invites the jury to draw inferences that are favorable to one of the parties from specified items of evidence. (See *People v. Mincey* (1992) 2 Cal.4th 408, 437.) We disagree. The trial court properly gave the flight instruction here based on the evidence of defendant’s fleeing the scene in his truck immediately after the shots were fired coupled with the evidence that he was a felon. Given this evidence, the fact that the jury was instructed that it could consider flight as a circumstance with other proved facts to establish guilt did not unfairly highlight the prosecution’s theory. (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Defendant also contends that section 654 precludes the trial court’s imposition of a consecutive term of eight months for the possession of ammunition conviction because it was based on the same conduct as the firearm possession. We conclude that the consecutive sentence for possession of ammunition must be stayed.

Section 654 proscribes multiple punishment where several crimes are committed during an indivisible course of conduct with a single criminal objective.<sup>4</sup> The divisibility of a course of conduct depends on the intent and objective of the defendant. “[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) If the evidence discloses that the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207.)

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<sup>4</sup> Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

The question of whether a defendant entertained multiple criminal objectives is a factual one for the trial court which has broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) The court's express or implied findings on the issue must be upheld on appeal if they are supported by substantial evidence. (*Ibid.*) We review the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

In *People v. Lopez* (2004) 119 Cal.App.4th 132, 138, the court held that section 654 precluded imposition of a concurrent sentence for unlawful possession of ammunition when the ammunition was contained in the firearm the defendant was convicted of possessing. "Where . . . all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*Ibid.*)

Although the present case is distinguishable from *Lopez* because the possession of ammunition conviction could have been based on the ammunition found in the area where defendant fell following his shooting of the weapon or that found in the gun, there was no evidence presented as to defendant's differing intent and objective in possessing the firearm and the ammunition.<sup>5</sup> With both offenses, the evidence was that defendant's objective was to shoot himself. The bullets found were of the same caliber as the loaded firearm. On these facts, section 654 barred imposition of a consecutive sentence for the possession of ammunition conviction because there was no evidence that defendant entertained multiple objectives. In short, there was no substantial evidence that defendant had any intent or objective to do anything other than to possess the firearm and the ammunition to kill himself. Accordingly, we modify the sentence to stay the eight-month consecutive term on the ammunition offense.

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<sup>5</sup> The prosecutor argued that defendant could be found guilty of the possession of ammunition charge based on the ammunition found in the gun, regardless of the ammunition found in the yard.

### **DISPOSITION**

The judgment is modified to stay the sentence on the possession of ammunition offense. The trial court is ordered to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P. J.

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REARDON, J.